IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2968 OF 2006

Shri Hambirrao Dada Patil
since deceased by legal
heirs .. Petitioners

Vs.

Shri Balkrishna @ Prabhakar
Amrut Bhave since deceased by
his heirs .. Respondents

Mr. T.S. Ingale for petitioners.
Ms. Gauri Godse for respondent no.1a to 1d.

CORAM: B.H. MARLAPALLE, J.

Date : June 20, 2006.

P.C.:

1. Heard Mr. Ingale the learned counsel for the petitioners who are original plaintiffs in Special Civil Suit No.57 of 1991. The original defendant appeared before the trial court in the said suit and filed Written Statement but thereafter remained absent. The suit was decreed on 31/12/1993 by the learned Joint Civil Judge, Senior Division at Sangli. Within about 3 weeks i.e. on 20/1/1994 the original defendant filed Misc. Civil Application No.52 of 1994 under Order IX Rule 13 of the Civil Procedure Code for

setting aside the decree passed ex parte on 31/12/1993. After hearing the parties, the learned Civil Judge, Senior Division at Islampur was pleased to dismiss the said application on 31/7/2003. The defendant, therefore, filed Misc. Civil Appeal No.40 of 2003 against the order dated 31/7/2003 and by the impugned judgment and order dated 23/3/2006 the I-Ad Hoc Additional District Judge, Islampur was pleased to allow the appeal and consequently Misc. Civil Application No.52 of 1994 came to be allowed.

2. There is no doubt that the decree dated 31/12/1993 was ex parte in as much as after filing the Written Statement no further steps were taken by the defendant either by cross-examining the plaintiff or by adducing evidence in support of the Written Statement and/or challenging the contentions in the plaint. The learned Judge of the Lower Appellate Court recorded as a finding that the defendant was prevented by sufficient cause in remaining absent in the trial of the suit and, therefore, the order of the trial court passed on 31/7/2003 was required to be set aside by restoring the suit. The application for

restoration of the suit was filed within 21 days and evidence was led in support thereof. Non production of Power of Attorney dated 7/2/1991 did not discredit or go against the defendant, noted the Lower Appellate Court. The Office Assistance working in Wadiya Hospital was examined at Exh.58 and he stated before the court that Madhav was admitted as heart patient on 19/11/1993 and though he was discharged on 20/11/1993, he was readmitted on 17/12/1993 and was discharged on 29/12/1993. He was again admitted on 2/1/1994 and discharged on 4/1/1994. Defendant was of old age and was required to be hospitalised. In such circumstances, the Lower Appellate Court rightly stepped into correct the erroneous approach of the trial court. No fault could be found with the view taken by the Lower Appellate Court in such circumstances.

3. Hence this petition filed under Article 227 of the Constitution fails and the same is hereby rejected summarily.

(B.H. Marlapalle,J.)